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U.S. Citizenship and Immigration Services

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FEB 08 2007

FILE: [redacted] Office: NEBRASKA SERVICE CENTER Date:
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IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a martial arts school and fitness center. It seeks to employ the beneficiary permanently in the United States as a martial arts instructor pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to aliens of exceptional ability whose services are sought by an employer in the United States. As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the job does not require an alien of exceptional ability.

On appeal, counsel asserts that the job duties require an alien of exceptional ability as demonstrated by the level four proffered wage designated by the New Jersey Department of Labor and Workforce Development. For the reasons discussed below, we uphold the director's decision. Moreover, we find that the record does not establish that the beneficiary is an alien of exceptional ability. Finally, the petitioner has not established that the beneficiary meets the requirements of the job, as the record does not contain the required initial evidence relating to job experience.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

JOB REQUIREMENTS

The regulation at 8 C.F.R. § 204.5(k)(4) provides the following information regarding labor certification:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed

> uncertified Form ETA-750 in duplicate must accompany the petition. The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application **must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability**.

(Bold emphasis added.) We note that on March 28, 2005, the Department of Labor replaced the Form ETA 750 with the ETA Form 9089.

The ETA Form 9089 reflects that the job requires no degree, no training and three years of experience. Part H, Line 14 lists no additional skills or other requirements. The prevailing wage is listed as $21.85 per hour and the offered wage is listed at $22 per hour. The job requires no education and three years of experience. The petitioner did not list any specific skills or other requirements in Part H, Line 14. The petitioner listed the following job duties:

> Lead martial arts classes in Tae Kwon Do. Discuss issues with students and parents. Demonstrate proper attitude and technique. Teach students on an individual and group basis. Organize, instruct, train and lead students in Martial Arts classes. Employ an extensive knowledge of martial arts, physical education, physiology, and corrective techniques to answer student and parent questions and correct student techniques. Assist in belt advancement testing. Employ motivational strategies and vary exercise programs to ensure student enjoyment and continued participation in the program.

The petitioner also submitted the Prevailing Wage Determination completed by the New Jersey Department of Labor and Workforce Development. The "skill level" designated by the department is "4." According to counsel, level four is above entry level, experienced and qualified (levels 1 through 3 respectively).

The director noted the job required only three years of experience, with no other education or other special requirements listed, and concluded that the job did not require an alien of exceptional ability.

On appeal, counsel asserts that the director should have issued a request for additional evidence prior to denying the petition. Counsel further asserts that an application for alien employment certification that listed three of the criteria for aliens of exceptional ability would be "tailored to the individual" and, thus, would not be approvable by the Department of Labor. Finally, counsel asserts that the director ignored the prevailing wage determination and the job duties, which are "beyond what is typical for a martial arts instructor."

The job requirements are listed on the ETA Form 9089 that forms the basis of this petition. The ETA Form 9089, the required initial evidence, was submitted initially. Based on the information contained on that form, the director concluded that the beneficiary was ineligible for the classification sought. Thus, the director was not required to issue a request for evidence. 8 C.F.R. § 103.2(b)(8). Moreover, counsel submits no new evidence on appeal and does not explain what evidence would have been submitted had the director issued a request for evidence. Thus, counsel has not persuasively established that the director erred in failing to issue such a request.

We will address whether the petitioner himself is exceptional below. At issue in this section is whether the job requirements suggest that the position itself requires an alien of exceptional ability. The requirements for exceptional ability are set forth at 8 C.F.R. § 204.5(k)(3)(ii). Those requirements, which will be discussed in more detail below, include a degree or diploma, 10 years of experience in the occupation, a license to practice the profession or occupation, a salary consistent with exceptional ability, professional memberships and recognition for achievements. An alien must meet at least three of these requirements to qualify as an alien of exceptional ability.

Counsel provides no support for his assertion that the Department of Labor would not certify an application for alien employment that required a degree, ten years of experience, or, on line 14, licenses, memberships or a history of successful competition. Regardless, the regulation at 8 C.F.R. § 204.5(k)(4) requires that the job offer portion of the alien employment certification reflect that the job requires an alien of exceptional ability. We are bound by that regulation.

Moreover, counsel provides no corroboration of his characterization of the significance of the skill level "4" designation by the New Jersey Department of Labor and Workforce Development. The unsupported assertions of counsel do not constitute evidence. *Matter of Obaigbena,* 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano,* 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez,* 17 I&N Dec. 503, 506 (BIA 1980). On the application for a prevailing wage determination, the petitioner indicated that the position required no education or training, three years of experience, no other special skills and no licenses. None of these requirements are indicative of exceptional ability as defined in the regulation at 8 C.F.R. § 204.5(k). Thus, for counsel's assertion that the skill level "4" designation is indicative of exceptional ability, the Department of Labor and Workforce Development must have made that determination based solely on the job duties. The record includes no corroboration from the department that it bases its skill level determination on the job duties or that a skill level "4" designation is indicative of a job that requires a degree of expertise above that ordinarily encountered in the field, the regulatory standard for aliens of exceptional ability.

Even if we accepted that the proffered wage was indicative of a degree of expertise above that ordinarily encountered in the field, a salary indicative of exceptional ability is only one criterion for aliens of exceptional ability. An alien must meet at least three for classification as an alien of exceptional ability.

Ultimately, the job requirements for the position do not suggest that the position requires an individual of exceptional ability. They do not include a degree, a license, professional memberships or formal recognition in the field. The petitioner has also not demonstrated that three years of experience in the position could only be attained after an additional seven years of experience in the broader occupation such that we can conclude the position effectively requires 10 years of experience *in the occupation.* Thus, we concur with the director's conclusion that the job requirements are not consistent with a position that requires an individual with exceptional ability as defined in the regulations.

EXCEPTIONAL ABILITY

Beyond the decision of the director, the petitioner has not established that the petitioner qualifies as an alien of exceptional ability. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd.* 345 F.3d 683 (9th Cir. 2003); *see also Dor v. INS*, 891 F.2d 997, 1002 n. 9 (2d Cir. 1989)(noting that the AAO reviews appeals on a *de novo* basis).

The petitioner seeks classification as an alien of exceptional ability. The regulation at 8 C.F.R. § 204.5(k)(3)(ii) sets forth six criteria, at least three of which an alien must meet in order to qualify as an alien of exceptional ability in the sciences, the arts, or business. These criteria follow below.

The regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered." Therefore, evidence submitted to establish exceptional ability must somehow place the alien above others in the field in order to fulfill the criteria below; qualifications possessed by every member of a given field cannot demonstrate "a degree of expertise significantly above that ordinarily encountered." Counsel claims that the beneficiary meets the following criteria.

> *An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability*

Section 203(b)(2)(C) of the Act provides that the possession of a degree, diploma, certificate or similar award from a college, university school or other institution of learning shall not by itself be considered sufficient evidence of exceptional ability. Thus, any evidence submitted to meet this criterion must be indicative of or consistent with a degree of expertise significantly above that ordinarily encountered.

Counsel asserts that the beneficiary's Dan level and black belt certification serves to meet this criterion and the license criterion at 8 C.F.R. § 204.5(k)(3)(ii)(C). Neither achievement is a degree, diploma, certificate or similar award from a college, university, school or other institution of learning. We acknowledge that the regulation at 8 C.F.R. § 204.5(k)(iii) provides that if the criteria do not readily apply to the beneficiary's field, the petitioner may submit comparable evidence. The same evidence may not be submitted as comparable evidence to meet two criteria if the requirement that an alien meet three criteria is to have any meaning. We find that the beneficiary's Dan level and black belt certification are far more comparable to a license than a degree, diploma, certificate or similar award from a college, university, school or other institution of learning. Thus, we find that the petitioner does not meet this criterion and will consider the beneficiary's skill certifications below.

Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought

Neither the petitioner nor counsel asserts that the beneficiary meets this criterion. We note that the beneficiary lists less than four years of experience on the ETA Form 9089, Part J. Even this experience, however, is not documented in the form of a letter from the employer.

A license to practice the profession or certification for a particular profession or occupation

Section 203(b)(2)(C) of the Act provides that the possession of a license to practice or certification for a particular profession or occupation shall not by itself be considered sufficient evidence of exceptional ability. Thus, we must determine whether the beneficiary's "licenses" are indicative of or consistent with a degree of expertise significantly above that ordinarily encountered.

Tuk Kong Martial Arts for Special Forces certified the beneficiary as a black belt on July 23, 2003. On April 25, 2005, Kukkiwon World Tae Kwon Do certified the beneficiary at the fifth Dan level. On November 30, 2005, The Korea Kukyewon Hapkido Association certified the beneficiary at the Kap Ki Do black belt Dan level. On January 8, 2001, the Ministry of the Korean Culture certified the beneficiary as a qualified physical trainer. On May 21, 2001, Kukkiwon World Tae Kwon Do certified the beneficiary as having passed the 3rd class qualifying examination of Tae Kwon Do instructor. On February 27, 2003, the Korea Footcare Association issued the beneficiary a certification of qualification as a "Footcare Master." On January 3, 2005, the Korea Sports Trainer Association issued a "qualification of license" for completing "the training full course of treatment sports by this Association." On November 30, 2005, the Korea Kukyewon Hapkido Association certified the beneficiary as a qualified instructor and referee.

While the petitioner would have bolstered the claim that the beneficiary meets this criterion by providing evidence regarding the type of certification ordinarily encountered among martial arts instructors, we are satisfied that the beneficiary meets this criterion.

Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability

Counsel does not assert that the beneficiary met this criterion as of the date of filing. While counsel has asserted that the offered salary is indicative of exceptional ability, the record contains no evidence that the beneficiary had already received a salary indicative of a degree of expertise above that ordinarily encountered. The petitioner must demonstrate the beneficiary's eligibility as of the date of filing. *See* 8 C.F.R. § 103.2(b)(12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). The petitioner has not demonstrated that the beneficiary met this criterion as of that date.

Evidence of membership in professional associations

Counsel asserts that the beneficiary is a member of the Korea Tae Kwon Do Association, the Korea Kukyewon Association and the Korea Tuk-Kong Martial Arts for Special Forces Association. While these organizations have certified the beneficiary's skills and qualifications as an instructor and referee, the record contains no evidence that they are "professional associations" with admitted "members." We have already considered this evidence under the license criterion and are not persuaded that it warrants reconsideration under this criterion. Thus, the petitioner has not established that the beneficiary meets this criterion.

Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations

The petitioner submitted a "Verification of Tournaments Achievement" from the Korea Tae Kwon Do Association for the following competitions:

1. First place at the National Juvenile Athletic Tournament in May 1994,
2. First place at the National High School Student Athletic Tournament in October 1997,
3. Second place at the National Athletic Tournament in October 2002 and
4. First place at the National Athletic Tournament in October 2004.

We are persuaded that these competitions, at least two of which were above the junior level, are sufficient to meet this criterion.

In light of the above, the petitioner has established that the beneficiary meets only two of the regulatory criteria. The evidence submitted to meet an additional two criteria includes the beneficiary's Dan level, black belt, instructor and referee certifications, the same evidence considered under the license criterion, set forth at 8 C.F.R. § 204.5(k)(3)(ii)(C). This evidence cannot serve to meet multiple criteria if the requirement that the alien meet at least three criteria is to have any meaning. Moreover, we are not persuaded that these certifications are comparable to the type of evidence required to meet the criteria set forth at 8 C.F.R. §§ 204.5(k)(3)(ii)(A) and (E). Overall, the petitioner has not established that the beneficiary possesses a degree of expertise significantly above that ordinarily encountered in the field of martial arts *instructors*.

THE BENEFICIARY'S QUALIFICATIONS FOR THE JOB OFFERED

An additional finding, also beyond the director's decision, is that the petitioner has not established that the beneficiary qualifies for the job offered. As stated above, the petitioner indicated that the job requires three years of experience in the job offered, martial arts instructor. The beneficiary listed nearly four years of experience as a martial arts instructor for Korea Special Force on the ETA Form 9089, Part J. The regulation at 8 C.F.R. § 204.5(g)(1) provides that evidence of employment "shall" be in the form of letters from the employer. The record does not contain a letter from Korea

Special Force confirming the beneficiary's employment there. Thus, the petitioner has not established that the beneficiary has the experience required for the job offered.

For the above stated reasons, considered both in sum and as separate grounds for denial, the petition may not be approved. The denial of this petition does not bar the filing of a new petition on behalf of the beneficiary under section 203(b)(3) of the Act as a skilled worker with more than two years of training and experience.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.